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For participants only

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Provisional summary record of the 3351st meeting
Held at the Palais des Nations, Geneva, on Thursday, 4 May 2017, at 10 a.m.

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Crimes against humanity (*continued*)

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Present:

Chairman:	Mr. Nolte
Members:	Mr. Al-Marri
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Kolodkin
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Crimes against humanity (agenda item 6) (*continued*) (A/CN.4/704)

The Chairman invited the Commission to pursue its consideration of the Special Rapporteur's third report on crimes against humanity (A/CN.4/704)

Mr. Kolodkin said that the Special Rapporteur was to be commended on the quality, structure and readability of his third report, whose length was justifiable given his objective of completing work on the topic without delay. He did not consider that the Special Rapporteur should have substantiated the customary nature of the rules proposed in the report, since many of them were detailed and related to procedural matters. He welcomed the Special Rapporteur's brief explanations as to why he had chosen to use the wording from existing international instruments. He had no difficulty with lifting provisions *mutatis mutandis* from treaties on topics other than crimes against humanity insofar as they related to procedural matters. The Special Rapporteur's choice of what to include in the draft articles was logical and balanced. The draft articles adopted previously together with those proposed in the third report had good prospects of becoming a convention. He therefore supported the Special Rapporteur's proposal to complete the first reading of the topic during the current session on the basis of the third report. He was in favour of referring all the draft articles in the third report to the Drafting Committee, with the exception of draft articles 15 and 16.

He would have preferred a shorter version of draft article 11, on extradition, but could work with the longer version in the report. The Special Rapporteur's approach was not to include a dual criminality requirement in the conditions governing extradition, in particular in the light of draft article 3 (4). However, that provision did not promote the uniformity of national laws criminalizing acts identified as crimes against humanity. If such an approach was followed, he suggested that the matter should be explained by means of commentary to draft article 11, based on the text of paragraph 33 of the report. Furthermore, a reference to membership of a particular social group should be added to draft article 11 (11) and the recommendation made by Amnesty International concerning the provision taken into account.

In draft article 12, on *non-refoulement*, he questioned the need for the words "under the jurisdiction". His preference would be simply to say "to another State" — the expression used in the International Convention for the Protection of All Persons from Enforced Disappearance, on which the Special Rapporteur had implied he would base the draft article, but for some reason had not. Moreover, the use of the term "to extradite" in the draft article raised questions as to its relationship with draft article 11.

He would also have preferred a shorter version of draft article 13, on mutual legal assistance, and wondered whether its paragraph 8 really added anything to paragraph 9. In paragraph 16 (b), instead of referring to "essential interests", he suggested that it might be helpful to list the grounds on which mutual legal assistance could be refused, in line with draft article 11 (11). He wondered how paragraph 21 of draft article 13 concerning the need for the prior consent of a State transmitting information for its disclosure by the receiving State, could be reconciled with its paragraphs 6 and 7 which, as he understood them, concerned the transmission of information received beforehand from a third State.

He had several concerns regarding draft article 15 on the relationship to competent international tribunals. The provision seemed contrived and was not in keeping with the principle of complementarity enshrined in the Rome Statute of the International Criminal Court. As currently worded, it might deter some States from participating in a future convention on crimes against humanity; the legal bases underpinning the provision were unclear. The constitutive instruments of international criminal tribunals varied greatly in nature and content. In his opinion, any conflict that might arise between the obligations under such constitutive instruments and those of any future convention should be resolved on a case-by-case basis, by applying different rules of international law, treaty provisions or general principles of law. The proposal to amend the draft article to the effect that the competent international tribunal must comply with the principles of international law would not resolve the problem of who would determine whether a tribunal had been established in

accordance with such principles. For example, the Russian Federation had abstained from voting on Security Council resolution 1757 (2007) on the establishment of the Special Tribunal for Lebanon, because it had considered that its establishment did not fully comply with international law. If the proposed amendment to draft article 15 was adopted, as a party to the future convention the Russian Federation could claim that the obligations arising under the Tribunal's Statute did not prevail over those under the convention. He therefore proposed that the draft article should be deleted.

As to draft article 16, on federal State obligations, he considered that matters relating to the territorial scope of any future convention were adequately covered by article 29 of the 1969 Vienna Convention on the Law of Treaties. Moreover, he was not convinced by the example of three treaties with clauses that expressly denied any accommodation to federal States, cited in paragraph 210 of the report. In his opinion, more examples could be found of universal treaties on crimes that did not contain a provision similar to draft article 16. Accordingly, he proposed its deletion.

He endorsed the basic thrust of draft article 17 and saw no reason to depart from the tried-and-tested three-tier method of inter-State dispute settlement it described. It would be wrong to impose on States parties to a future convention the compulsory jurisdiction of the International Court of Justice. He suggested that the commentary to the draft article should mention the need for the negotiation as well as any attempt to agree on the organization of the arbitration to be in good faith and genuine. As to the wording of the draft article, he recalled that when discussing the first few draft articles some members had spoken of the responsibility of States, not only in the sense of the prevention and punishment of crimes against humanity, but also in the sense of their commission. Responsibility in that sense was not explicitly mentioned in the draft article; however, it was mentioned in the commentary to draft article 4, on the obligation of prevention, where parallels were drawn with the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). If the Commission considered that draft article 17 covered the responsibility of States for crimes against humanity, then it should include an explicit reference in its paragraph 2, based on article IX of the Genocide Convention. Paragraph 2 would therefore read: "Any dispute between two or more States concerning the interpretation or application of the present draft articles, including those relating to the responsibility of a State for crimes against humanity …".

Regarding the remaining issues not covered in the draft articles, he agreed with the Special Rapporteur that the inclusion of questions such as monitoring mechanisms, reservations, immunity and amnesty would complicate the project for States; in any case, the question of a monitoring mechanism for a convention on crimes against humanity could be decided at a later date, as with other treaties. As far as immunity and amnesty were concerned, he did not share the view that the trial and criminal prosecution in international or hybrid courts of the perpetrators of crimes against humanity should be an integral part of any post-conflict settlement. In his view, justice should not be imposed on a nation or a State that had lived through the hardest moments in its history and suffered crimes against humanity. They should have the right to choose between criminal prosecution, full or partial amnesty or the establishment of truth, justice and reconciliation commissions according to their specific circumstances. It should not be an obligation established *a priori* in an international treaty as a general rule that would provide for all future cases.

He held a similar view regarding proposals that the draft articles should refer to the irrelevance of the immunity of State officials from foreign criminal jurisdiction with regard to crimes against humanity. States were free to choose not to invoke the immunity of their officials suspected of committing crimes against humanity and liable to foreign prosecution. It was their right, and, in some cases, they exercised that choice. A rule on the absence of such immunity should not be imposed on States. Instead of being a panacea for the commission of crimes against humanity, it was more likely that such a rule would make it difficult for some States to participate in a future convention. In many cases there was every justification for bringing criminal proceedings in relation to crimes against humanity but there were insufficient legal grounds. In that connection, he referred to the case of the former President of the Soviet Union, Mikhail Gorbachev, summoned as a witness in the criminal case against former Soviet officers accused of having committed crimes against

humanity in Vilnius, Lithuania, in January 1991. The Russian Ministry of Justice had refused to deliver the summons to Mr. Gorbachev and had invoked a provision of a bilateral treaty on mutual legal assistance, but it could have invoked the former President's immunity *ratione materiae*.

If it was feasible for the Drafting Committee to revisit some of the draft articles adopted previously, he stressed the need to consider where to place the provision to the effect that no exceptional circumstances could be invoked as a justification of crimes against humanity, currently in draft article 4 (2).

Mr. Hmoud said that the Special Rapporteur was to be commended on his third report, which aimed to cover all remaining issues as well as matters raised by members, States and other actors. The Special Rapporteur had struck a balance between practicality, legal policy and the need to have an effective law enforcement instrument to combat crimes against humanity. The draft articles adopted previously, together with most of the articles proposed in the report, constituted a comprehensive set of articles ready for submission to the General Assembly. Nonetheless, the success of the project would largely depend on the Commission's ability to achieve a final product that took into account all the legitimate concerns of relevant actors and the international community. In that regard, he had some general comments to make.

Like other members, he found the report far too long and, although relatively easy to read, it could have been condensed, especially in its discussion of comparative treaty provisions. It could have been divided into two parts so that two separate debates could have been held, as with the topic of reservations to treaties. Concerning the Special Rapporteur's intention to complete the first reading of the topic during the current session, he shared the view that the Commission should not rush matters. It was too important a topic whose outcome would affect the lives of millions of human beings to burn stages. He was convinced that through the Special Rapporteur's tremendous efforts the draft articles would make a big difference in the fight against crimes against humanity. However, it was imperative that the Commission create solid and common ground for States to build on for a convention.

Regarding the sources used in the report, he agreed that there was more emphasis on treaty law than on exploring the customary law basis for some of the draft articles. Certain provisions were based on treaties or conventions which were not relevant to the current project and had no plausible link. That was especially true of the formulations based on the text of the United Nations Convention against Corruption; yet instruments which were more relevant to the topic, such as the Geneva Conventions of 1949 and the Genocide Convention, were only briefly discussed, mostly in the footnotes. Provisions from conventions that purported to punish international crimes, such as terrorism, were mentioned in some and not in other places, without any explanation. While he understood that some of the proposed draft articles served policy considerations, purported to fill gaps or to maximize protection against crimes against humanity, he recalled that the final product would be subject to inter-State negotiations, where a plausible connection with the relevant instruments would be sought. Nonetheless, as far as procedure-related matters were concerned, such as the provisions concerning extradition and mutual legal assistance, he considered that the proposed draft articles were defensible.

The consideration and treatment of customary international law needed further elaboration on other matters such as *non-refoulement*, immunity and amnesty. The Commission's deliberations and the reactions of various actors on the draft articles proposed in the report must be taken into account in order to decide how to deal with such matters on second reading. He held the view that merging the Commission's work on crimes against humanity with other initiatives to create an inter-State mutual legal cooperation mechanism for other international crimes would weaken the outcome of the Commission's project and the opportunity to fill gaps in the protection against crimes against humanity.

Turning to specific comments on the draft articles, he said that draft article 11 was one of the most important in the project and was necessary to exclude the possibility of any procedural impediment to the implementation of a State's obligation to extradite.

Extradition procedures varied from one State to another, and unless there were bilateral or multilateral arrangements that established uniform conditions and processes, extradition would face legal obstacles. The Special Rapporteur provided sufficient reasons for choosing the long version of the extradition provision in the Convention against Corruption and the United Nations Convention against Transnational Organized Crime over the short version in the Convention against Torture and the Convention on Enforced Disappearance; however, he was not convinced that the fact there were 181 States parties to the Convention against Corruption was an indication that States would accept the same text for a future convention on crimes against humanity. He agreed with the Special Rapporteur that a provision requiring dual criminality was not necessary in the draft article on extradition, since the requirement of criminalization under national law was already contained in draft article 5.

Regarding draft article 11 (1), on offences deemed extraditable, he considered that reference should be made to draft article 5 and not to draft article 3, as some members had suggested, since the latter merely defined crimes against humanity. He agreed that the political offence exception should not apply to extradition — it was a universally accepted principle. Under draft article 11 (4) (b), a State did not have an obligation to conclude extradition treaties with other States when it did not use the draft articles as a basis for extradition, but should seek to do so. Since that could create an impediment to extradition and the State would have to submit the case for prosecution based on draft article 9, he suggested that it might be worthwhile considering making the procedure under paragraph 4 (b) mandatory, in case there was no extradition treaty between the requesting and requested States.

Draft article 11 (11), under which a State had the right to deny an extradition request on the ground of possible persecution, required further study. When seeking to prevent extradition States could always claim that a request had been made on unlawful, political or other grounds. They would then have to submit the matter to prosecution by national authorities, which might attempt to shield the State from international responsibility for breach of the treaty obligation. In his view, objective guarantees against a politically motivated extradition request were thus a better alternative. He considered that multiple extradition requests should be decided by the requested State. There was no reason to consider that the territorial State or the State that received the first request should have priority over the State of the victims or perpetrators. Nonetheless, the requesting and requested States should be encouraged to consult with each other before determining to which State the perpetrator would be extradited.

In draft article 13, on mutual legal assistance, the Special Rapporteur had again opted for the long-form approach taken in the Convention against Corruption as opposed to the short-form approach taken in such instruments as the International Convention for the Suppression of Terrorist Bombings and the Convention on Enforced Disappearance. Draft article 13 purported to ensure maximum inter-State cooperation in the investigation, prosecution and trial of cases involving crimes against humanity. It offered the requested State the flexibility to accede to requests for assistance within the limitations of its national laws while preserving the core benefit of a streamlined procedure for the provision of mutual legal assistance. However, the Special Rapporteur offered no explanation or evidence to justify the assertions made in paragraph 122 of the report, that the long form was "viewed by States as necessary in the context of crime prevention and punishment in important areas of transnational organized criminal law" and that it had been "accepted in practice by States". The fact that 181 States were parties to the Convention against Corruption did not make the long form accepted practice in the field of combating crimes against humanity. That said, the long-form article, with its "mini mutual legal assistance treaty", could serve as a useful tool for maximizing cooperation where no treaty existed between the requesting and requested States. He was not sure that draft article 13 (8), which gave priority to obligations under bilateral or multilateral treaties governing mutual legal assistance, was necessary. As a general rule, previous treaty obligations remained valid unless they conflicted with later treaty obligations on the same subject matter.

Draft article 14, on victims, witnesses and others, was yet another important inclusion in the draft that reflected developments in the field. The protection of victims and

witnesses was especially warranted in view of the gravity of the crimes involved and the possibility that the perpetrators could be part of the State or organizational apparatus responsible for implementing policies that involved crimes against humanity. There was no global treaty to protect the victims and witnesses of crimes against humanity and no uniformity in the instruments or practice of international tribunals dealing with such crimes. Thus, it was particularly important to harmonize the rules that applied at the inter-State level. Although there was an emerging norm that provided victims and witnesses of crimes against humanity with legal standing and protection, the exact content thereof was still not uniform.

He agreed with the Special Rapporteur that there was no need to provide a definition of who qualified as a victim of a crime against humanity. That should be left for States to determine, as long as their laws recognized the concept. While the protection envisaged in the draft articles was essentially aimed at individuals, nothing in the draft articles restricted a State's ability to extend such protection to legal persons it considered as victims. Similarly, while the participation of victims in criminal proceedings was important, it should be left to each State to provide for it in its laws and procedures. The qualification in draft article 14 (2) was therefore appropriate.

The provision of reparation, which was addressed in draft article 14 (3), strengthened the protection of victims and provided them with needed relief. The paragraph was drafted in such a way as to take account of the disparities in States' ability to provide measures of reparation. It should be noted that it was the individual perpetrator who should assume responsibility for reparations. A State whose wrongful act or omission contributed to the commission of crimes against humanity should also assume responsibility in regard to reparation, as should any organized group involved in the perpetration of such a crime. To demand "full" reparation or remedy would be to set a threshold so high as to be almost impossible to meet in all situations. Experience with setting up voluntary trust funds was not encouraging, though it would be worthwhile considering the establishment of a mandatory victims' funds with stable resources. Such funds could contribute to relief and rehabilitation efforts. On the question of guarantees of non-repetition, he was not sure how they could be implemented when the perpetrator of the offence was an individual.

With regard to draft article 16, he agreed that there should be no exception to the application of the draft articles to all parts of federal States, whether under declarations of territorial application or so-called "federal clauses". Any such limitations would be incompatible with the objective of providing maximum protection under a future convention. If such limitations were permitted, a federal State fighting insurgents in one part of its federal territory where crimes against humanity were being committed would be able to opt out of the application of the convention to that part of its territory. Consequently, the final clauses of a future convention should ensure that draft article 16 was not subject to reservations.

Regarding draft article 17, on inter-State dispute settlement, the Special Rapporteur provided ample examples of existing and possible monitoring mechanisms. The core issue was the role envisaged for any given mechanism. The role of existing treaty-monitoring bodies was determined by their mandate under their respective instruments. Their interpretative role, which was also derived from their mandate, might be useful but could not be considered authoritative for the purposes of the current drafting exercise. Providing the treaty bodies with a role in monitoring the implementation of a future convention would be legally complicated and controversial. Nevertheless, the creation of a monitoring mechanism for a future convention on crimes against humanity was important for several reasons. First, States were usually hesitant to invoke inter-State dispute settlement mechanisms for legal, political, financial or other reasons. Thus, violations of the obligations under a future convention, if they were to be confronted in an effective and swift manner, should be dealt with in the context of a monitoring mechanism. That would ensure that States and organizations acted in a manner that was consistent with the spirit and content of the convention. Secondly, the interpretation of the convention could be included in the mandate of the monitoring mechanism, so as to avoid leaving its interpretation to each State, which would lead to disparities in its application. Thirdly, draft article 17 contained an opt-out clause that would limit the application of the dispute

settlement mechanism to resolving disputes, making States less hesitant to invoke it. It should be remembered that a monitoring mechanism and a dispute settlement mechanism served distinct purposes. Whereas dispute settlement procedures took a certain amount of time, action to stop or prevent the commission of crimes against humanity must be swift and would be best served by the creation of a monitoring mechanism. He was in favour of an independent monitoring mechanism composed of experts serving in their personal capacity, as well as a mechanism for convening a conference of States parties, which would help ensure that action was taken swiftly. As such mechanisms would play an integral part in combating crimes against humanity in an effective manner, there was no plausible reason for not including them in the draft article. As for the dispute settlement mechanism set out in draft article 17, there was some merit in allowing States to opt out of it and seek arbitration or referral to the International Court of Justice, since that would encourage more States to become parties to the convention.

As to the question of *non-refoulement*, covered in draft article 12, he noted that the Special Rapporteur had not provided any customary law source to justify its inclusion. There was not even an evolving norm to that effect under customary international law. While the Special Rapporteur had chosen not to provide for the prohibition of immunity and amnesty in the draft articles, in part because he did not perceive an established customary basis for a rule on their prohibition, he had done the opposite with regard to *non-refoulement*. The report cited several conventions and treaties that prohibited *refoulement* but they were all related either to the protection of a protected person, such as someone in a situation covered by the Fourth Geneva Convention, or of individuals at risk of a particular crime being committed against them by virtue of their beliefs, race, religion or other consideration, under such instruments as the Convention on Enforced Disappearance, the Convention relating to the Status of Refugees or the Convention against Torture. Draft article 12, as formulated, did not take that into account, especially in relation to the grounds that a State could invoke for not expelling or returning a person. Draft article 12 (2) bore no relation to the definition of crimes against humanity. A consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law could exist independently of the commission of crimes against humanity. Draft article 12 (2) should have been formulated to reflect the definition of such crimes in draft article 3. Moreover, crimes against humanity might be committed in one part of a State but not in another. To introduce a blanket prohibition of return to all areas or territories, when such return was otherwise not prohibited under international law, would create legal obstacles to the implementation of a future convention. Returning an individual to the State authorities or to areas where that person would be in no danger of being subjected to crimes against humanity should not be prohibited. If included, draft article 12 should be amended to reflect that.

While the Commission's work on the topic of immunity of State officials from foreign criminal jurisdiction was ongoing, it was not specifically relevant to the current discussion on the topic of crimes against humanity, where the question was whether there should be any reference to the issue of immunity. Without the inclusion of some form of provision barring immunity of State officials, there was a risk that States might invoke such functional or personal immunity to block prosecution or extradition. Even if domestic law criminalized crimes against humanity on the basis of draft article 5, a State might refuse extradition and submit the case to its prosecution authorities, who could invoke the immunity of State officials. Remarkably, in such cases the relevant State would not be violating its obligations under the draft articles. It was therefore important to include a provision, which, at least, made it clear that a person's official capacity did not confer immunity. In any case, the commentary should not give the impression that immunity was not prohibited under the draft articles.

He did not share the Special Rapporteur's view that amnesty was not yet prohibited under customary international law for the crimes of most concern to the international community. The prohibition of crimes against humanity was *jus cogens* and amnesty ran counter to such peremptory rules. In that regard, he noted the discrepancy in the analysis attributed to Antonio Cassese in paragraph 292 and the quotation from him in footnote 506 in the report. It should also be noted that the report did not discuss United Nations practice in the field or the fact that the United Nations did not endorse peace agreements that

provided amnesty for the most serious international crimes such as crimes against humanity. If no provision on amnesty was included in the draft articles, the prohibition of amnesty should at least be mentioned in the preamble. Also, the commentaries should refrain from giving the impression that amnesty might be allowed under the draft articles: failing to punish the offence would violate draft article 5 on criminalization under national law.

As for the relationship to competent international tribunals, which was the subject of draft article 15, the relevant rules under general international law should apply, namely the *lex posterior derogat legi priori* rule as set forth in article 30 of the 1969 Vienna Convention. While he understood the concerns expressed by some commentators in relation to the Rome Statute, a special rule in the draft articles that gave precedence to certain prior rules over others should be resorted to only in exceptional circumstances, which did not exist in the present case. Such a draft article would create unnecessary legal complications, given that the draft articles had been drawn up with the preservation of the integrity of the Rome Statute in mind.

Reservations were a legal policy issue, and so there was a need to balance all the various legal interests. The Special Rapporteur had elaborated on every possible option, from no reservations at all to a list of allowed and prohibited reservations. The best possible option, however, was to remain silent on the matter and to refer in the commentary to the relevant rules of the 1969 Vienna Convention and the Guide to Practice on Reservations to Treaties, especially on issues such as reservations that violated the object and purpose of the instrument or vague and general reservations. Making a list was not a good idea, as it would be open to challenge during the inter-State negotiations on the future convention.

Although he had no objection to replicating the preamble from the Rome Statute, it should be tailored to the particularities of the draft articles as an inter-State law enforcement instrument to combat crimes under national law.

In conclusion, he recommended sending draft articles 12, 14, 15, 16 and 17 and the preamble to the Drafting Committee, but reserved his position with regard to draft article 13 for the reasons he had given.

Mr. Tladi, referring to Mr. Hmoud's assertion that the United Nations did not endorse peace agreements that provided amnesty for the most serious international crimes, noted that, in 2011, the United Nations Security Council had in fact endorsed the peace agreement between the warring parties in Yemen. He would be interested to hear Mr. Hmoud's views on that.

Mr. Hmoud said that, in the case of Yemen, the Security Council had been essentially referring to the agreement between the parties to the conflict, and had not dealt with the issue of the amnesty granted to President Saleh under an accord brokered by the Gulf Cooperation Council, which was a separate matter altogether.

Mr. Jalloh said that Mr. Hmoud was correct to say that the position of the United Nations was that, under international law, amnesties were not permissible for the most serious international crimes — genocide, war crimes and crimes against humanity. That was why the Special Representative of the Secretary-General present at the Lomé peace negotiations in 1999 had entered a disclaimer with respect to the agreement reached between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone. The disclaimer had proved to be crucial to what was to become article 10 of the Statute of the Special Court for Sierra Leone, which had provided the basis for the decision of the Court's Appeals Chamber on the defendant's claim that he could not be tried because the agreement granting him amnesty had been signed by representatives of the international community. Since then, the United Nations had maintained its policy position on amnesties.

However, a distinction should be drawn between blanket amnesties and more limited ones. In the case of Colombia, for example, when the Government was trying to conclude an agreement to put an end to years of internal armed conflict, the Prosecutor of the International Criminal Court had decided to keep a watchful eye on the situation before deciding whether to prosecute or not. That suggested that the acceptability of a carefully tailored amnesty of limited scope and with some elements of accountability built into it remained something of an open question.

Mr. Kolodkin said that clarity was needed on whether the policy position of the United Nations was actually that of the Organization, its Members or its Secretariat.

Mr. Gómez-Robledo said that in the case of Colombia it was important to bear in mind that the Prosecutor of the International Criminal Court had still not requested the Pre-Trial Chamber to open an investigation. The case was still at the preliminary review stage in the Office of the Prosecutor.

Mr. Grossman Guiloff suggested that, given the need to establish the facts with regard to amnesty and international law, the Secretariat could be asked to compile a compendium of decisions of the United Nations treaty bodies and statements by the United Nations High Commissioner for Human Rights on the subject.

Mr. Jalloh said that he agreed with Mr. Gómez-Robledo's comments and supported Mr. Grossman Guiloff's proposal. Nevertheless, he wished to draw attention to a statement by the Prosecutor of the International Criminal Court on the conclusion of the peace negotiations between the Government of Colombia and the Fuerzas Armadas Revolucionarias de Colombia — Ejército del Pueblo (Revolutionary Armed Forces of Colombia — People's Army). The Prosecutor had said that the final peace agreement was undoubtedly a historic achievement and a critical step towards ending a protracted conflict; however, she had gone on to say that she had supported Colombia's efforts to bring an end to the decades-long armed conflict "in line with its obligations under the Rome Statute" since the beginning of the negotiations and "would continue to do so during the implementation phase". He interpreted that as meaning that she was going to keep a watchful eye on the situation and reserved the right to prosecute, provided, of course, that there was evidence likely to lead to a conviction. Her statement suggested, to him at least, that she might be open to the idea of a peace agreement that included an element of accountability but offered no blanket amnesty.

The Chairman said that if the Secretariat was to prepare the compendium proposed by Mr. Grossman Guiloff, it would need to be given a precisely formulated request and a clear time frame. He suggested that the Drafting Committee on crimes against humanity could take up those matters.

Mr. Saboia said that he agreed with the suggestions made by Mr. Grossman Guiloff and the Chairman, adding that the Drafting Committee, in formulating the request, should bear in mind the case law of the Inter-American Court of Human Rights, which had taken a number of decisions relating to amnesty.

Mr. Grossman Guiloff said that he also agreed with the Chairman's suggestion. He wished to clarify that the Colombian peace agreement did exclude serious crimes under international law, including crimes against humanity. It was true that the implementation of the agreement needed to be carefully monitored, inter alia, with regard to the length of the prison sentences handed down. It was important to note that a truth commission had been established, and that the experience of various truth commissions in Latin America showed that amnesty was not a valuable tool in the process of national reconciliation.

Mr. Šturma said that the Special Rapporteur had prepared a report which was very clear, well structured and documented by numerous references to relevant treaties. The report could have been slightly shorter; it was in fact two reports rolled into one, having been drafted to take advantage of a window of opportunity in which all the draft articles presented could be adopted on first reading at the present session. He fully supported the Special Rapporteur's approach in that respect.

Since there had been some debate on the nature of the present topic within the International Law Commission, he wished to reiterate that the topic was not outside the mandate of the Commission. On the contrary, the drafting of articles for future conventions had always been part of its mandate. The definition of crimes against humanity and the general obligation to prevent and punish such crimes undoubtedly involved the codification of customary international law, as they were crimes arising from violations of *jus cogens*. At the same time, the primary purpose of the draft articles was to provide a multilateral treaty on inter-State cooperation, including extradition and mutual legal assistance, with obligations that would be binding on States parties. Although the drafting of such

provisions differed from the usual codification work, the Commission was not barred from going ahead without a prior request from the General Assembly.

In an ideal world, it would be preferable to have one comprehensive convention on all core crimes under international law. However, from a practical perspective, there was little chance that a convention that also included genocide and war crimes would be adopted, and a convention on crimes against humanity was better than none. While a convention on crimes against humanity would need to include more elements than older treaty regimes, it should be borne in mind that the most recent treaties were not always the most appropriate models for such a convention.

In his view, the fundamental theoretical problem was distinguishing between crimes against humanity as crimes under general customary international law and transnational crimes, such as corruption, which were criminalized only under special conventions. In the words of Mr. Cherif Bassiouni, the former were based on a direct enforcement regime and the latter on an indirect enforcement regime. It was not merely a theoretical distinction, but also had practical implications. It would be a rather unfortunate consequence if the draft articles created the misleading impression that crimes against humanity were just like ordinary crimes or merely treaty-based offences.

Concerning the methods used by the Special Rapporteur, he focused on treaty obligations aimed at enhanced inter-State cooperation. Since most of the draft articles presented in the report dealt with new treaty law obligations, it made sense to base them primarily on examples and comparisons of existing multilateral criminal law conventions. Such an approach was justified, as the Commission was aiming to develop a new, progressive, state-of-the-art convention. However, it was justified only to the extent that it would not dilute the aforementioned distinction. From that perspective, the extensive references to the Convention against Corruption might be counterproductive. Although it was the most recent and detailed criminal law instrument, it might not necessarily be compatible with crimes against humanity, which were much closer in nature to the conventions against torture, genocide or enforced disappearances. That did not mean that provisions from the Convention against Corruption should not be used, but that they should be amended, where appropriate.

Turning to the proposed draft articles, he said that draft article 11 on extradition was certainly one of the most important provisions. In view of the debate on the nature of crimes, he agreed with the Special Rapporteur that there was no need to include a double criminality requirement. He also supported the inclusion of a provision on the non-applicability of political offences to extradition, as set out in paragraph 2. He considered that the basic obligation was already covered in draft article 9, on *aut dedere aut judicare*, and that draft article 11 included provisions of a more procedural and technical nature. However, he shared the view that some provisions applicable to corruption or other transnational but ordinary crimes were not suited to crimes against humanity, particularly the minimum penalty requirement in draft article 11 (6) and the territorial aspect reflected in draft article 11 (8).

As to the possible grounds for refusal of extradition, he agreed that the issue of the death penalty merited consideration. It should be included in draft article 11 rather than in draft article 12 because the principle of *non-refoulement* was established as an absolute obligation. A death penalty exception should be left as an option, at the discretion of individual States.

With regard to draft article 13, he believed that the option of a "mini mutual legal assistance treaty" was justified; yet, once again, the model of the Convention against Corruption should be modified. For example, draft article 13 (4), according to which States should not decline to render mutual legal assistance pursuant to the draft article on the ground of bank secrecy, was perfectly relevant for corruption and other economic crimes but seemed odd in the context of crimes against humanity.

Regarding draft article 14, he welcomed the inclusion of a provision on the protection of victims, witnesses and others, particularly the inclusion of the right of victims to obtain reparation. Although he considered that guarantees of non-repetition were not a typical form of reparation, he supported all the forms set out in draft article 14 (3). In his

view, it was an issue of terminology rather than of substance: if the word "reparation" was replaced by a more general term, such as "remedy" or "redress", it might well cover all the forms.

Concerning draft article 15, he found the treatment of the relationship to competent international criminal tribunal useful. However, in view of possible future international or hybrid criminal tribunals, he welcomed the idea of including a qualification. For example, the words "which respects general principles of criminal law" could be placed after "instrument of a competent international criminal tribunal", with an explanation in the commentary that the principles were those set out in the Rome Statute.

As to chapter VII, he welcomed the presentation of existing monitoring mechanisms, but endorsed the Special Rapporteur's decision not to mention them in the draft articles. Nevertheless, perhaps some mechanisms could be dealt with in an optional protocol, which the Commission might be entrusted to draft in the future, depending on the views of States in the Sixth Committee. He expressed support for the dispute settlement mechanism described in draft article 17 that covered both negotiation and judicial settlement. However, the provision on the procedure for referring any dispute that could not be settled through negotiation to the International Court of Justice might have to be streamlined and strengthened, with a reference made to the issue of State responsibility, in line with article IX of the Genocide Convention.

He commended the Special Rapporteur for having addressed the important remaining issues in chapter VIII of the report. He agreed that a provision on concealment would not be appropriate in the draft articles on crimes against humanity and that issues related to transitory justice, such as amnesty, should not be covered. However, he would welcome at least a brief provision on the irrelevance of official capacity, similar to article IV of the Genocide Convention or article 27 of the Rome Statute. He also agreed that the question of final clauses should be left to the conference of States parties to decide.

In conclusion, he recommended that all the draft articles should be referred to the Drafting Committee, and expressed the hope that the Commission would be able to adopt them on first reading.

Mr. Cissé, referring to chapter I of the report, said that according to paragraph 22 many States refused to extradite in the absence of an extradition agreement. The Commission should focus on how to resolve that difficulty with a view to combating crimes against humanity as effectively and firmly as possible. As the Special Rapporteur had rightly recalled, one way of addressing the issue would be to consider that, once a State was a party to a multilateral convention that contained provisions on extradition, as would be the case with a future convention on crimes against humanity, the convention would form the legal basis for extradition in the absence of an extradition treaty. In other words, the new convention would take precedence, which would strengthen the legal regime of extradition and the system of accountability, by depriving States that did not wish to extradite a person of the excuse that there was no extradition treaty in place. That aspect was well reflected in paragraphs 23 and 50 of the report. The scenario in which extradition was not made conditional on the existence of a treaty was also well illustrated in paragraph 56. However, he questioned the relevance of quoting article 44 on extradition from the Convention against Corruption *verbatim* and *in extenso*. Since crimes against humanity and the crime of corruption were different in nature, it was important to make judicious choices among the 18 paragraphs of article 44 and keep only those applicable to crimes against humanity. Simple comparisons were not sufficient, and it was therefore necessary to refocus the debate primarily on crimes against humanity. He welcomed the Special Rapporteur's effort to reduce the number of paragraphs to 13, but believed that an additional effort at concision could be made in order to stick more closely to the topic.

While the drafting of a new convention concerned the international community as a whole, it was of particular concern to the African continent, which had been the scene of grave crimes against humanity. He was therefore of the opinion that the report should have gone into more detail on the situation in Africa. It would also be worth considering including a provision in the draft article on extradition that States must adopt legislation criminalizing and punishing crimes against humanity. The legislative systems in many

African countries were still lacking in that regard or too weak to effectively punish such crimes. Over the past few decades, ordinary African citizens and high-ranking political and military officials had been prosecuted by the international criminal courts. The Commission's project would benefit from taking account of the extremely important role that could be played by African regional and subregional organizations when it came to punishing and preventing crimes against humanity. For example, the Special Rapporteur could focus his research on initiatives or other legal instruments adopted by the African Union or the Economic Community of West African States in the field of corruption and consider to what extent their approach to extradition issues might be applicable to crimes against humanity committed on that continent and elsewhere. The issue of immunity was not covered in any of the draft articles proposed in the report, despite the fact that political and military officials very often claimed immunity in order to escape prosecution for crimes against humanity. The elaboration of such a draft article would be entirely appropriate, as it would not contradict the relevant provisions of article 27 (1) and (2) and article 33 of the Rome Statute.

With regard to the wording of draft article 11, paragraph 1 could be amended in the Drafting Committee. He proposed that, in the French version, the word "*peut*" (may) in the first and second sentences should be replaced with "*doit*" (must), as the former might be interpreted to mean that States could simply choose whether or not to extradite. The word "*doit*" would be more appropriate and would be more effective in combating impunity for crimes against humanity. A "without prejudice" clause could be added at the end of paragraph 1, referring to the relevant provisions of international legal instruments related to extradition for crimes against humanity. For the sake of expediency and consistency, paragraph 4 should address the plausible hypothesis in which a State did not make extradition conditional on the existence of an extradition treaty.

Chapters II, III, IV and V largely reflected the applicable law in the area of extradition from both a procedural and a substantive point of view, and the Special Rapporteur was to be commended on his in-depth research into various aspects of the issue. However, for the purposes of a draft convention on crimes against humanity, chapter VI on federal State obligations seemed somewhat excessive and did not contribute a great deal to the overall clarity of the report. In addition, the provisions on dispute settlement did not seem relevant in that crimes against humanity already came under the jurisdiction of international criminal tribunals such as the International Criminal Court. In any event, the States concerned could bring cases before the International Court of Justice, the principal judicial organ of the United Nations.

In his view, the length of the report had not had an impact on its quality. He recommended the referral of all the proposed draft articles to the Drafting Committee.

Mr. Saboia said that the report covered a wide range of issues of great relevance for a convention such as the one envisaged. Extradition, the first topic addressed in the report, was a very important tool for ensuring that alleged offenders, if not prosecuted in one State, were subject to prosecution by another State, with due care taken to respect the protection afforded in international human rights and refugee law. He agreed with the proposal not to have a separate provision on dual criminality, for the reasons summarized in paragraph 32. He also agreed with the proposals regarding the provisions on inclusion as an extraditable offence in existing and future treaties and exclusion of the political offence exception to extradition. He endorsed the content of the first five paragraphs of draft article 11. Regarding paragraph 6, on other requirements of the requested State's national law, he found the analysis and proposed language pertinent. Nonetheless, like previous speakers, he wondered whether the Special Rapporteur had considered the possible imposition of the death penalty by the requesting State as one of the grounds for refusing extradition, as provided for in the Constitution and national law of Brazil, as well as in article 23 of the draft articles on the expulsion of aliens. As paragraph 6 of draft article 11 referred to the "minimum penalty" and other grounds on which extradition could be refused, that might be the place to consider the matter. He supported the recommendation made in the paper by Amnesty International that the list of grounds for denying extradition cited in paragraph 11 should be the same as the one contained in the Rome Statute.

As to draft article 12, the Special Rapporteur had chosen the Convention on Enforced Disappearance as a model, substituting the reference to enforced disappearance with one to crimes against humanity. The principle of *non-refoulement* was commonly used in international human rights instruments to avoid exposing a person subject to extradition or expulsion to the danger of being subjected to torture, summary execution, or other gross violations of human rights in another State or territory. The protection afforded by the principle extended to all persons and situations — a point which was addressed in draft article 11 (11) only as a possible exception to the obligation to extradite and not as a mandatory norm. Linking it solely to crimes against humanity, which had a very high threshold, would narrow the scope of protection. He therefore proposed that the words "and other crimes under international law or gross violations of human rights" should be added at the end of paragraph 1 of draft article 12.

Mutual legal assistance, dealt with in draft article 13, was a matter of great significance for the effectiveness of a future convention on crimes against humanity. Legal assistance could be a tool both for law enforcement and for early warning or deterrence of crimes against humanity. As shown by the Special Rapporteur, there was a gap in that area, as existing treaties generally had only a few provisions establishing general obligations. Instruments such as the United Nations Convention against Transnational Organized Crime and the Convention against Corruption provided useful precedents of what was referred to in the report as a "long-form article for mutual legal assistance". He therefore expressed support for paragraphs 1 to 5 of draft article 13. He proposed the addition of the phrase "collecting or obtaining forensic evidence" in paragraph 3 (d). He was in favour of the deletion of the phrase "that is not contrary to the national law of the requested State" in paragraph 3 (i). Mutual legal assistance and cooperation in the field of international crimes should follow high standards and the practice of international tribunals, such as the International Criminal Court and the International Criminal Tribunal for the Former Yugoslavia, and not necessarily be tied to national standards. The inclusion of a provision on bank secrecy, as in paragraph 4, warranted further explanation. Paragraphs 6 and 7 provided for a sophisticated model of information sharing, which had proved quite effective in the fight against organized transnational crime. It remained to be seen how it would operate in cases of international crimes, where political factors might play a larger role and high-ranking officials might be involved. At first sight there might be some conflict between the operation of actions under paragraphs 6 and 7, which appeared to fall outside the area of competence of the central authorities, and those provided for in paragraph 10 on the designation and operation of central authorities. Paragraph 16 contained an excessively long and often vague and subjective list of grounds for refusing mutual legal assistance; an effort should be made to delete some of them.

Stressing the importance of the provisions on participation and protection of victims and witnesses and others, he said that, in his extensive analysis of relevant treaties and institutions, the Special Rapporteur could have looked more deeply at the practice of the International Criminal Court. The jurisprudence of the Inter-American Court of Human Rights could also be helpful. The participation in the criminal proceedings of victims and witnesses might help the proceedings, afford victims and relatives a measure of satisfaction and give added legitimacy to the process. The Special Rapporteur's consideration of that matter in the third report was well reasoned, and the proposed draft article 14 was a good text that should be referred to the Drafting Committee. Possible changes aimed at strengthening and widening the scope of protection and compensation recommended by Amnesty International deserved attention. With regard to chapter V, on the relationship to competent international criminal tribunals, he endorsed the Special Rapporteur's analysis, in paragraphs 203 *et seq.* of the report, on the importance of avoiding any broad language that might weaken the draft articles. He therefore supported the text of draft article 15.

He also supported the text of draft article 16, which provided that clauses authorizing exceptions to obligations for federal States were unacceptable. However, paragraph 208 of the report contained language that might be interpreted as opening the possibility of reservations to that article. In chapter X, on final clauses, the Special Rapporteur, although apparently neutral on the options at hand, was in fact leaning towards not including a clause on reservations. In his view, that would be a great mistake. In the twenty-first century, when efforts were being made to improve coverage of the prohibition

and repression of crimes such as genocide, crimes against humanity and war crimes, he questioned the purpose of a convention that left the door open to reservations of all kinds. He would thus be in favour of a draft article prohibiting them.

With regard to chapter VII of the report, he appreciated the useful review of existing and potential monitoring mechanisms provided therein. The Special Rapporteur made pertinent points on factors that could influence the choice of a particular mechanism, with an emphasis on the availability of resources and the possible relationship with existing mechanisms. He welcomed the suggestion that the development of a monitoring mechanism for a future convention on crimes against humanity might be made in tandem with the establishment of such a mechanism for the Genocide Convention. While he understood that it might be necessary to postpone consideration of that matter, he was convinced that a future convention would not fulfil its goal if no means was provided to monitor compliance and provide early warning of situations of concern. He endorsed Mr. Hmoud's remarks in that regard. The convention must be a living instrument, providing for channels of communication with relevant bodies dealing with serious situations where gross human rights violations and breaches of international humanitarian law threatened to reach the threshold of crimes against humanity. Of course, duplication with other bodies and ambitious structures should be avoided. The chosen mechanism and structure could function under the umbrella of an existing multilateral organization, if possible.

Regarding chapter VIII, on remaining issues, he agreed with the Special Rapporteur that there was no need to include a separate provision specifically criminalizing the concealment of a crime against humanity. However, he did not share the Special Rapporteur's view on immunity. It was regrettable that, in his analysis of the issue, the Special Rapporteur had not duly taken into account two important works, produced by the Commission at the request of the General Assembly, which had practically launched a new phase of international criminal law. The first was the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle III of which provided that "the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law". The second was the Code of Crimes Against the Peace and Security of Mankind, article 7 of which established that "the official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment". Article 8, meanwhile, stipulated that, "without prejudice to the jurisdiction of an international criminal court", each State party had an obligation to establish its jurisdiction over the crimes set out under the Code. While he understood the need to avoid overlap with other topics on the Commission's agenda, the matter at hand was not the immunity of State officials from foreign criminal jurisdiction; rather, it was the obligation of each State party to establish jurisdiction over all individuals under its competence and to exercise that jurisdiction irrespective of the official position of those individuals. A convention on crimes against humanity should not contain any provision that could be interpreted as accepting, even implicitly, the exclusion of responsibility on account of official capacity, as that would open the door to impunity, undermine the credibility of the convention and damage the International Criminal Court. He therefore shared the view that the Commission could envisage a provision similar to article IV of the Genocide Convention. Amnesties, the granting of which was a controversial issue, should not, in his view, be permissible with respect to crimes against humanity or to other core crimes under international law. Subject to the comments made, he supported the referral of the draft articles to the Drafting Committee.

Ms. Lehto said that she wished to join other members in thanking the Special Rapporteur for his comprehensive third report, which provided a solid basis for the Commission's debate. While the length of the report had drawn comments, it could be justified insofar as the early completion of the topic was dependent on the inclusion of all the remaining draft articles and related issues that needed to be addressed. The Commission had a clear interest in proceeding expeditiously with the topic of crimes against humanity for several reasons.

First, the topic was of great practical relevance. A future convention based on the draft articles would facilitate inter-State cooperation in criminal matters with a view to ensuring that crimes against humanity were investigated and prosecuted. It would also provide practical tools for the implementation of the principle of complementarity under the Rome Statute. Secondly, the urgent need for such a convention had been widely recognized, and Governments, international organizations, treaty bodies, civil society organizations and scholars were following the Commission's work on the topic with keen interest. Thirdly, given that the most sensitive issues had, arguably, already been discussed in relation to the draft articles contained in the Special Rapporteur's second report, and that what remained were, to a large extent, standard provisions for which there were numerous precedents, it would not have been ideal to produce two reports to be discussed in two successive years. The Special Rapporteur's ambition to complete the first reading at the current session was therefore laudable.

She was not saying that the proposed draft articles should not be carefully considered, but it was worth recalling that the network of international criminal law conventions had grown, over the previous three decades, into an important body of law. Those instruments mostly contained standard provisions and formulations with substantially similar content. Procedures for extradition and mutual legal assistance, in particular, had developed and matured in that way by gradual accumulation. Of course, that did not preclude the Commission from modifying and improving the text of the draft articles, and she agreed that the Commission should strive to achieve the best possible outcome.

As to the methodology, she believed that it was appropriate to refer to relevant criminal law conventions and to use, with the necessary modifications, the provisions and formulations that best served the purposes of the draft articles. The addition of examples of State practice in the commentaries, as proposed by some members, would be welcome, but she did not see a need for an extensive analysis of State practice.

Turning to the draft articles proposed in the report, she said that, while it had been pointed out that draft articles 11 and 13, in particular, had been modelled on the Convention against Corruption, it should be noted that many of the individual paragraphs were standard provisions found in a number of other conventions. She agreed with the Special Rapporteur that there was no reason to include a dual criminality requirement in draft article 11 and endorsed the statement, in paragraph 32 of the report, that when an extradition request was sent from one State to another for an offence referred to in draft article 5, the offence should be criminal in both States and the dual criminality requirement should be "automatically satisfied". It had been suggested that in draft article 11 (1), reference should be made to the substantive offences set forth in draft article 3 and not to the modes of liability provided for in draft article 5. While it was a valid point that paragraphs 1, 2, 3, 7 and 8 of draft article 11 should refer to draft article 3; it was debatable whether they should refer exclusively to that draft article.

In existing conventions, such as the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism and the Council of Europe Convention on the Prevention of Terrorism, the rules of extradition contained references to both substantive and ancillary offences, while in the Convention on Enforced Disappearance, reference was made simply to "the offence". Although there might be other conventions in which reference was made only to one or the other set of offences, by referring to both draft article 3 and draft article 5, the Commission could ensure that it left no room for conflicting interpretations.

Given the very serious nature of crimes against humanity, and following the approach taken in recent United Nations criminal law conventions that dealt with serious crimes, she supported the exclusion of the political offence exception in draft article 11 (2). At the same time, it was clear that, in line with current practice, the prohibition of the political offence exception must have as its corollary the so-called discrimination clause protecting the person whose extradition was sought from persecution.

She shared the view that there was cause to reconsider the formulation of the discrimination clause in draft article 11 (11), as the list of prohibited grounds originated

from previous decades and might not include all the impermissible grounds recognized under modern international law. She therefore supported the Special Rapporteur's proposal to add the words "or membership in a particular social group", or language to that effect. The most appropriate wording could be agreed upon in the Drafting Committee. In her view, the reference to national law in draft article 11 (6) was too open-ended, as it allowed States to refuse extradition on grounds that were not appropriate with regard to crimes against humanity. It could be useful to include, in that paragraph, a general reference to conditions that were deemed impermissible as grounds for refusal, and to enumerate them in the commentary. The existence of the death penalty as a recognized ground for refusal in many jurisdictions could also be addressed.

She fully supported the inclusion of the principle of *non-refoulement* as draft article 12. However, it would be desirable to give further consideration to whether the principle should be applied only to crimes against humanity or also to other serious human rights violations. She agreed that references to territory could be removed from both paragraphs of the draft article, leaving just the mention of jurisdiction.

It was true that draft article 13 stood out because of the level of detail that it contained. At the same time, its provisions offered useful tools for States wishing to exercise their jurisdiction with regard to crimes against humanity. Some streamlining might be required, but she would caution against making wholesale changes. Whether or not the detailed regulations should instead appear in an annex to the convention was a separate matter altogether, and one that she believed should be explored.

Draft article 14 was consistent with recent developments in international criminal law that reflected growing concerns regarding the victims of violent crime and the security of witnesses. To quote the United Nations Office on Drugs and Crime: "States have a responsibility to respect the fundamental rights of victims, assist them in accordance with their special needs, and protect them from further harm. All criminal justice systems have a duty to put in place procedures to provide measures for the protection of persons whose cooperation with the criminal justice system in an investigation or prosecution, puts them, or persons closely associated with them, at risk of serious physical or emotional harm." She therefore wished to commend the Special Rapporteur for including victims, witnesses and others in the provision.

She proposed that the wording of draft article 14 should be more closely aligned with that of the Convention on Enforced Disappearance. That would apply, first and foremost, to article 24 (1) of the Convention, which contained a definition of "victim" for the purposes of the Convention that extended to any individual who had suffered harm as the direct result of an enforced disappearance. There was a risk, as pointed out by another member, that allowing the decision as to who should receive protection to be taken at the national level might lead to the use of very narrow definitions or to selective policies that excluded certain groups and prioritized others. She further proposed aligning draft article 14 (1) (a) with article 12 (1) of the Convention on Enforced Disappearance, which laid down an obligation to investigate complaints. As to draft article 14 (1) (b), she supported the proposal to provide for broader measures aimed at protecting the psychological well-being, privacy and dignity of victims and witnesses. She also concurred with the view that it was important to devote special attention to the protection of victims of sexual and gender-based violence and child victims of international crimes, as both groups were in a particularly vulnerable position.

With regard to draft article 14 (4), paragraphs 4 and 5 of article 24 of the Convention on Enforced Disappearance contained some helpful language on reparations, including compensation, that could help in addressing some of the points raised earlier in the debate. Paragraph 4 stipulated that "each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation"; while paragraph 5 contained a list of different forms of reparation that could be granted where appropriate, and clarified that the right to obtain reparation covered material and moral damages.

She expressed support for draft article 15 as well as the proposal to clarify, in the related commentary, that competent international criminal tribunals must fulfil certain

fundamental criteria, which would provide a safeguard against the future "unknown entities" referred to by one member. She also expressed support for draft article 16 and valued the thorough analysis of monitoring mechanisms contained in chapter VII of the report. She would not object to the Special Rapporteur expressing a preference in that regard or presenting a model clause, as he had done for reservations in chapter X. She supported the inclusion of draft article 17 and saw merit in the proposal to strengthen the case for judicial settlement.

As to chapter VIII of the report, she agreed with the proposal not to address concealment or immunity in the draft articles, for the reasons presented by the Special Rapporteur; however, she supported the proposal to include a provision on the duty of States parties to exercise jurisdiction over all individuals under their competence, irrespective of the official position of those individuals. The issue of amnesty, meanwhile, warranted further reflection.

Concerning chapter IX, she appreciated the fact that the draft preamble was not overly long and agreed that the Genocide Convention and the Rome Statute were obvious models to be followed. Nevertheless, she too had reservations about including the last two paragraphs, on the threat or use of force and on intervention in an armed conflict or in the internal affairs of any other State. It was not clear how the paragraphs were linked to the substance of the draft articles, as the operative part of any future convention. She would also appreciate a reference to the Rome Statute in the preamble.

The analysis of reservations in chapter X, coupled with a model provision, would be helpful for States, if and when they embarked on negotiations on the basis of the draft articles. However, she did not take as sceptical a view of the prohibition of reservations as the Special Rapporteur. The Rome Statute was, in that sense, an appropriate model for a future convention on crimes against humanity, but she welcomed the many safeguards that he had included in his model clause. To conclude, she supported the referral of the draft articles to the Drafting Committee.

Mr. Al-Marri said that he wished to express his appreciation to the Special Rapporteur for his comprehensive third report, which addressed a number of key issues and contained excellent proposed draft articles.

Having presided over the Conference of the States Parties to the United Nations Convention against Corruption, he was highly sensitive to the link, emphasized by the Special Rapporteur, between the Convention and the draft articles, particularly in terms of extradition and mutual legal assistance. Indeed, the draft article on extradition was largely modelled on article 44 of that Convention.

He considered that there was a major need to strengthen international cooperation in order to expedite the prosecution of perpetrators of crimes against humanity. He welcomed the reference, in the report, to the political offence exception, which was also addressed in article 44 of the Convention.

As a public prosecutor with experience of tackling serious crimes, he valued the provisions contained in the report, and as a lawyer specialized in fighting corruption, he was thankful to the United Nations and other actors for the significant human and financial resources that had been devoted to capacity-building in the countries that needed it most.

He agreed with the Special Rapporteur that there was no need to include a dual criminality requirement in the draft article on extradition. Moreover, while it was useful to draw on experience of implementing the Convention against Corruption, the differing nature of corruption and crimes against humanity meant that reliance on the provisions of the Convention should be limited, as acknowledged by the Special Rapporteur.

Since the granting of extradition requests and the provision of mutual legal assistance were largely contingent on political will, considerations of a political nature were a major factor and should be borne in mind. The issue of *non-refoulement* was complicated, and he would urge the Commission to reconsider draft article 12 in order to ensure that it was in harmony with draft article 11.

Draft article 17, on dispute settlement, was somewhat premature and should be considered at a later date. He agreed with the Special Rapporteur that the draft articles should be finalized in the near future and, though time might be an issue, he was hopeful that the first reading could be completed at the current session.

Crimes against humanity had to be viewed in relation to other serious crimes, and the Commission should provide guidance to States or other actors that might be reluctant to punish the perpetrators of such crimes. Lastly, he stated his view that, for the time being, the Commission's focus should be on reinforcing territorial, rather than universal, jurisdiction.

The meeting rose at 1.05 p.m.